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SUPREME COURT, U. S.

Supreme Court, U.S.
JUN 17 1971

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

70-300

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No. ———

NEZ PERCE TRIBE OF INDIANS,
Petitioner.

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Claims

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Petitioner, the Nez Perce Tribe of Indians of Idaho, prays that a writ of certiorari issue to the Court of Claims to review the judgment of the Court entered in the above-entitled case on March 19, 1971.

OPINIONS BELOW

Court of Claims, March 19, 1971, —— Ct.Cl. —— (reprinted below, Appendix A).

Ind. Cls. Comm., November 14, 1969, 22 I.C.C. 53 (reprinted below, Appendix B).

Court of Claims, July 15, 1966, 176 Ct.Cl. 815, cert. den. 386 U.S. 984 (1967) (reprinted below, Appendix C).

Indian Claims Commission, April 7, 1964, 13 I.C.C. 184.

JURISDICTION

The judgment of the Court of Claims was entered on March 19, 1971. Jurisdiction is invoked under Section 20(c) of the Indian Claims Commission Act, 60 Stat. 1049, 25 U.S.C. § 70s(c), and 28 U.S.C. § 1255.

STATUTE INVOLVED

Agreement of May 1, 1893, ratified by Act of August 15, 1894, 28 Stat. 286, 326-332, I Kapp. 536, reprinted as Appendix D.

QUESTION PRESENTED

In 1894 the United States bought certain lands from an Indian tribe for $1,626,222, agreeing to distribute $626,222 to the Indians immediately, and agreeing to hold the balance for the Indians at interest. The Indian Claims Commission, acting under its statutory power to revise Indian treaties to do justice, revised the price to add another $1,387,911, and revised the agreement to pay interest so as to apply to the $1,387,911. The question is whether the Commission had the power to do this.

STATEMENT OF THE CASE

The Nez Perce Indians, formerly one of the powerful tribes of the Northwest, today reside on scattered individual allotments in the northern part of Idaho, near Lewiston. Aboriginally they occupied a vast area in Washington, Idaho and Oregon. The pressure of white settlement led to the first cession in 1855,[1] whereby the Indians ceded some of their land, and kept the rest, about 7,000,000 acres, as a reservation. Gold was discovered on this reservation in 1860, which led to uncontrolled white trespasses, trouble, and eventually another cession

[1] Treaty of June 11, 1855, 12 Stat. 957.

in 1863.[2] This cession reduced the Indians' reservation to 762,000 acres.[3]

Unfortunately for the Indians, their 1863 reservation still contained good lands coveted by the white settlers, and this resulted in the final disappearance of the Nez Perce reservation as a tribally-owned unit. Under the Agreement of 1894,[4] each adult Indian was allowed to select an allotment, and the remainder, some 549,559 acres, was thrown open to white settlement. The Indians were paid $2.97 per acre,[5] or a total of $1,626,222.[6]

Article 3 of the 1894 Agreement provided that out of the money to be paid to the Indians, $626,222 was to be paid to the individual Indians per capita as soon as practicable, and

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[2] Treaty of June 9, 1863, 14 Stat. 647.

[3] This background is detailed in *Nez Perce Tribe* v. *United States*, 3 Ind.Cl.Com. 571 (1955); *Nez Perce Tribe* v. *United States*, 8 Ind. Cl.Com. 220 (1959); and *Nez Perce Tribe* v. *United States*, 13 Ind. Cl.Com. 184 (1964).

[4] Appendix D; 28 Stat. 286, 326-332.

[5] The Agreement called for $3.00 per acre, but the amount actually paid was $2.97.

[6] For background, the Court may be interested in having some idea of what the ceded lands were worth. The ceded lands were about 50% potential farmland, 25% timberland, and 25% grazing land, comprising a virgin island in the middle of a prosperous farming community. Nearby contemporary timber sales averaged over $13 per acre and nearby contemporary range sales averaged over $4. Contemporary farmland sales averaged $29 in the more populous county, adjacent to the reservation in the north, and $14 in the more remote county, adjacent to the reservation in the south. These were improved farms, and so the $29 and $14 should be reduced somewhat to reflect the value of the unimproved lands (the Court of Claims suggested a 25% discount; Appendix C at p. 41a). After the ceded lands themselves came on the market, they averaged $19 per acre for farmland, and $4.66 for rangeland. Farm leases averaged $2.73 per acre per year, and grazing leases 53¢. In light of all this, even the $5.50 awarded by the Commission (which suggests about $7 for the farmland, $6 for the timber, and $2 for the rangeland) seems hardly generous.

> "The remainder of said sum of [$1,626,222] shall be deposited in the Treasury of the United States to the credit of the 'Nes Perces Indians, of Idaho,' *and shall bear interest at the rate of five per centum per annum*, which principal and interest shall be paid to said Indians per capita as follows, to wit: At the expiration of one year from the date of the ratification of this agreement the sum of fifty thousand dollars, and semi-annually thereafter the sum of one hundred and fifty thousand dollars with the interest on the unexpended portion of the fund of one million dollars until the entire amount shall have been paid. . . ." (Emphasis added)[7]

In 1951, pursuant to the Indian Claims Commission Act,[8] the Nez Perce Tribe filed a claim with the Indian Claims Commission. The Indians claimed the true value of the land they ceded was much greater than what they were paid. They alleged fraud, duress, unconscionable consideration, unilateral mistake, and sought to recover "just compensation."[9]

The Indians specifically asked the Commission to allow interest on any award, because of the language of the Agreement, italicized in the quotation above. They referred to the Indian Claims Commission Act, which expressly authorizes the Commission to hear and determine—

> ". . . (3) claims which would result *if the treaties, contracts and agreements* between the claimant and the United States *were revised* on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether in law or fact, or on

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[7] 28 Stat. at 329, Appendix D at p. 52a.

[8] 60 Stat. 1049 (1946), 25 U.S.C. § 70.

[9] Petition, p. 4.

any other ground cognizable by a court of equity; . . ." [10] (Emphasis added.)

The Indians argued that their claim should draw interest because if the Agreement were revised to provide for a fair price for the land, then the interest clause should be revised also so as to apply to the increased consideration.

The first opinion of the Commission (1964) held that a case for unconscionable consideration had not been made out, and consequently, they did not reach the interest claim.

The Indians appealed to the Court of Claims. The Court of Claims handed down its first opinion in 1966, see Appendix C. It intimated that it thought an unconscionable consideration claim had been made out, and remanded for further proceedings. The Court also considered and rejected the interest issue.

A petition for certiorari on the interest question was duly filed in this Court, which was denied. 386 U.S. 984 (1967), No. 1041, O.T. 1966. Since the Government had urged that the petition be denied as premature, the Tribe asked this Court to clarify its denial of certiorari as to the prematurity point. This Court declined to do so. Order of April 24, 1967.

Thereupon the Tribe pursued the case on the remand to the Indian Claims Commission. While the remand proceedings were pending, this Court handed down a decision allowing interest in another Indian claim. *Peoria Tribe* v. *United States*, 390 U.S. 468 (1968).

On November 14, 1969, the Commission issued its second opinion, Appendix B, allowing additional consideration of $1,387,911. The Commission also allowed 5%

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[10] 25 U.S.C. § 70a(3).

simple interest from the date of the Agreement, August 15, 1894, to date of payment,[11] citing the *Peoria* case.

The Government appealed to the Court of Claims on the Commission's method of arriving at the amount of the award, and the allowance of interest thereon. On March 19, 1971, the Court of Claims issued its opinion. Appendix A. It remanded the case to the Commission for additional findings to support its award, and reversed the Commission's decision as to interest.

The Tribe now respectfully petitions this Court to review the Court of Claims' decision denying interest.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Claims is contrary to this Court's decision in the *Peoria* case,[12] in spirit if not in letter, and unless resolved will cause uncertainty in the processing of future Indians claims where treaties of cession provide for interest on undistributed consideration. The decision also establishes an illogical and arbitrary limitation on the power of the Indian Claims Commission to make equitable revisions of treaties of cession, and will cause uncertainty and confusion until corrected.

The Decision Below is Contrary to the Peoria Case

When Congress passed the Indian Claims Commission Act in 1946,[13] it intended to give each Indian tribe of this country a chance to litigate its claims against the United States. Congress was motivated by a desire to do justice, to show tribes that the Government cared about their grievances, and, perhaps, to alleviate the national conscience.[14]

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[11] As of August 15, 1970, the interest would have been 380%, or $5,274,062.

[12] *Peoria Tribe* v. *United States*, 390 U.S. 468 (1968).

[13] 60 Stat. 1049, 25 U.S.C. § 70.

[14] See, e.g., H. Rept. 1466, 79th Cong. 1st Sess. (1945). Congress was also tired of dealing with tribal petitions on a piecemeal basis.

It was an extraordinary piece of legislation, and Congress laid down an extraordinarily liberal standard under which to allow claims; Congress provided that the tribes could recover on claims—

> ". . . which would result if the treaties . . . were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity . . ." 25 U.S.C. § 70a(3).

And in case a tribe could not make out a case on ordinary equitable grounds, it could still recover on—

> ". . . claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity." 25 U.S.C. § 70a(5).

To administer these extraordinarily liberal standards (and to have no other function) Congress established a special tribunal, the Indian Claims Commission. 25 U.S.C. § 70b.

Pursuant to its warrant, the Commission determined that the terms of the Nez Perce Agreement of 1894, whereby those Indians ceded certain land for $1,626,222, were unconscionable, and should be revised to allow a higher price, to wit, $1,387,911 more. In addition, and this is the point in issue, the Commission determined that the Government's agreement to pay 5% interest on the undistributed portion of the $1,626,222 should also apply to the additional consideration of $1,387,911.

The Commission has rarely allowed interest on Indian claims, and did so in this case only because the Government had expressly agreed to pay interest on the undistributed portion of the consideration. The Commission felt that fairness required that that agreement should also apply to the additional consideration found to be due, and that the parties would have so applied the Agreement had they realized that additional consideration was owing. Consequently, the Commission revised

the interest clause to apply to the additional consideration.

At an earlier stage in this case, the Court of Claims had rejected the claim for interest, on the rationale that the 1894 Agreement specified exactly how much the undistributed consideration would be (to wit, $1,000,000), and to say that the parties would probably have agreed to interest on the additional consideration of $1,387,911 was not enough to justify allowing it. Appendix C, p. 48a.

Five months later, in a similar case, the Court of Claims made a similar ruling. *Peoria Tribe* v. *United States*, 177 Ct.Cl. 762 (1966). In that case the Indians ceded land to the United States, but instead of specifying the price, the United States agreed to sell the land at public auction and credit the actual proceeds to the Indians. After the proceeds started coming in, the President and the Indians were to consult to see how much should be distributed to the Indians and how much "invested in safe and profitable stocks, the interest to be annually paid . . ." However, the Government sold most of the land at private sale, which supposedly brought less proceeds than would have a sale at public auction.

In a claim brought under the Indian Claims Commission Act, the Peoria Tribe recovered $172,726 as the difference in value between what they received as a result of the private sale, and what they would have received at public auction. But the Commission refused to allow interest, and the Indians appealed. The Court of Claims likewise refused to allow interest, because the Treaty left the question of the amount to bear interest to the discretion of the Government:

> "In summary, the 1854 treaty clearly specified that the disposition of the proceeds of the land sales was left to the discretion of the President. Therefore, it would be judicial treaty-writing for us to read into that agreement an express promise by the Government to pay interest." 177 Ct.Cl. at 770.

But this reasoning was then reversed by this Court on certiorari.[15] This Court did not hesitate to engage in what the Court of Claims had called "judicial treaty-writing" and to apply the treaty as if there were a firm agreement to pay interest on the additional proceeds not awarded until 1968, and properly so.

This Court cited *United States* v. *Blackfeather*, 155 U.S. 180 (1894), involving the Shawnee Tribe, where the Government likewise agreed to sell Indian lands at public auction and place all proceeds in excess of a certain amount in a fund for the Indians. The Government agreed to pay the Indians an annuity of 5% of the amount in the fund. The Government sold some of the lands at private sale, supposedly realizing less proceeds than at public auction. Congress could have dissolved and paid over the fund to the Indians at any time, and in fact it did so in 1852, twelve years after the lands were sold. The Court held that the annuity promise was the same as an interest promise and allowed 5% interest to date on the entire shortage.

If the Peoria and Shawnee Tribes were entitled to interest, there is no just reason to deny it to the Nez Perce Tribe. The *intent* of the Government to pay interest on the undistributed proceeds of sale was as clear here as there. In the *Peoria* and *Blackfeather* cases this Court construed the treaty to read as if it said, "We will sell the land and hold the proceeds for you at interest, and if a court later rules that we did not give you enough money, we will of course pay interest on that, too." The Nez Perce agreement should be construed in exactly the same way. As noted in *Peoria*, Indian treaties are not to be interpreted narrowly, but—

> ". . . in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people." 390 U.S. at 472-3.

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[15] *Peoria Tribe* v. *United States*, 390 U.S. 468 (1968).

We concede that there are differences between the *Nez Perce*, *Peoria* and *Blackfeather* cases:

1. *Nez Perce* and *Peoria* were brought under the Indian Claims Commission Act, while *Blackfeather* was brought under a special jurisdictional act.

2. *Nez Perce* involved a sale to the United States for resale to settlers, while *Peoria* and *Blackfeather* involved sales directly to the settlers. Accordingly, the consideration happened to be known in advance in *Nez Perce* but not in *Peoria* or *Blackfeather*.

3. *Nez Perce* involved a cession of 550,000 acres, while *Peoria* and *Blackfeather* involved 209,000 and 94,000 acres respectively.

4. The difference between what the Indians received and what they should have received was $1,387,911 in *Nez Perce*, $172,726 in *Peoria*, and $39,042 in *Blackfeather*.

5. In *Nez Perce* the Government did not breach the agreement as written; its wrongdoing took place prior to the agreement. In *Peoria* and *Blackfeather* the Government's wrongdoing took place after the treaties were written.

The similarities would seem to outweigh the differences.

1. In all three cases the Government caused the Indians to give up their lands for the benefit of the settlers, whose interest the Government favored over that of the Indians.

2. In all three cases the Government promised to give the Indians some of the proceeds to spend and promised to invest the rest.

3. In all three cases the Government breached its obligation to see that the Indians were paid a fair price.

4. In all three cases it is reasonably clear (and legally presumable) that if the Government had realized that it

owed more for the land, the excess would have been invested for the Indians.

5. In all three cases the Government for many years had the interest-free use of the additional consideration as if it had been deposited in the Treasury.

6. The policy of liberal construction in favor of the Indians applies to all three groups, and in the *Peoria* and *Nez Perce* cases the favorable policy of the Indian Claims Commission Act applies as well.

In light of these similarities, it cannot equitably or logically be held that the additional consideration due to the Peoria and Blackfeather groups should be put at interest, while that due to the Nez Perce group should not be.

The interest claim cannot be denied on the ground that it was uncertain whether the government would have put the additional consideration in the interest fund, as the Government argued. In the *Peoria* case, the agreement was that as the funds came in from sales of the lands, the parties would agree as to how much would be paid directly to the Indians and how much invested for them. Despite the complete uncertainty as to how much would have been put in the investment fund, this Court held that *all* of the additional consideration would be deemed to have belonged in the investment fund, and would draw interest until 1968.

> "Under Article 7 of the treaty, the United States could at any time pay to the Tribe all or any part of the proceeds received from the sales of the lands at public auction. But until the proceeds were paid over, the United States was obligated to invest them and pay the annual income to the Tribe. The United States was not free merely to hold the proceeds without investing them." 390 U.S. at 471.

And in *Blackfeather*, the agreement was that some of the proceeds would be paid directly to the Indians and some put in a fund at interest. Congress could have paid

the fund over to the Indians at any time and thus terminated the obligation for interest, and in fact it did so in 1852, only twelve years after the land had been sold off. Despite the uncertainty of the continued existence of the interest fund (and its short life in fact), this Court held that the entire additional consideration would be deemed to belong in the interest fund, and to draw interest until paid over to the Indians.

In light of this Court's *Peoria* decision, the Indian Claim Commission applied the same attitude to the instant case, which differs only superficially from the *Peoria* (and *Blackfeather*) facts. So doing, it "revised" the interest clause in the 1894 Agreement to make it apply to the additional consideration awarded under the Indian Claims Commission Act.

The Government appealed to the Court of Claims below, which cancelled the interest award. The Court distinguished *Peoria* on the ground that there the Government broke its treaty in failing to sell the lands at public auction, whereas here the Government complied with the 1894 Agreement as originally written; and because there the interest agreement did not specify the principal amount, whereas here it did. Appendix A, p. 6a. As enumerated above, the distinction is artificial, and the situations are in fact so similar that fairness does not permit different results.

The Decision Below Improperly Limits the Commission's Power to Revise Treaties

The Tribe also argued that revision of treaties was clearly within the Commission's power, and if it could increase the price the Government agreed to pay, a fortiori it could revise the interest clause so as to make it apply to the increased price.

The Court of Claims rejected this argument, on the ground that it was "unable to say with certainty" that had the total consideration originally been $1,387,911

more than it actually was, the Government would have agreed to put any part of it at interest. It declared that at least so far as interest claims were concerned, it could not revise treaties "based on speculation as to what the parties might have done." Appendix A, pp. 7-8a.

The court did not explain why the uncertainty as to what the parties would have agreed would draw interest differed from the uncertainties in the *Peoria* and *Blackfeather* case as to how much the President or Congress would have declared would draw interest. The court simply indicated (p. 8a) that when it comes to an interest question, there can be no revision.

But this frustrates the intent of Congress, which was to give the Indian Claims Commission very broad power to do what is fair on a case-by-case basis. Congress could easily have added a proviso to Clause 3 barring revision so as to allow interest, but it did not do so. That is not to say that interest claims are necessarily allowable (and our case is the only one of its type where the Commission has allowed interest, so far as we are aware), but at least they are entitled to be considered on their merits, the same as any other claim.

Sec. 2(3), 25 U.S.C. § 70a(3) is not clear as to what is meant by the grant of the power to revise treaties, and the cases have not spelled out how much certainty is required as to what the parties would have agreed before a revision can be declared. The word "revised" suggests "reformed," a well known Equity remedy, but reformation is not applicable in this sort of case. In reformation cases, the court does not "reform" what the parties agreed upon; it only reforms the written instrument which fails to reflect what the parties agreed upon. The theory is that the parties came to an understanding, but in reducing it to writing, through fraud, duress, mistake, etc., some provision was omitted or mistakenly inserted,

and Equity will reform the agreement to conform to what the parties actually agreed.[16]

And yet Congress was obviously talking about fraud, duress, mistake, and unconscionable consideration, as unfair acts on the part of the Government which gave the Indians causes of action. Under normal principles of equity, these causes of action lead to rescission,[17] not reformation, since there is no meeting of the minds (assuming there is no error in reducing the agreement to writing), and of course rescission is not a permissible remedy under the Act.

Here we have a case where the Indians were paid an unconscionably small consideration. Sec. 2(3) of the Act allows the Commission to award damages as if the agreement were revised on the ground of unconscionable consideration. Obviously, to give effect to this, it is necessary to conclude that Congress intended the Commission to have the power which even a court of equity lacks—the power to reform an agreement (hypothetically, of course) to make it provide *not* what the parties *actually* intended, *but what the parties would have intended had they both intended to make a fair deal, been aware of the true facts, and in the Indians' case, been capable of acting intelligently in light of those facts.*

It is important that this principle be brought out into the open and recognized, because it means the fact that the United States agreed to pay interest to the Nez Perces

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[16] Restatement, *Contracts* § 491 (1932); 45 Am.Jur., *Reformation of Instruments* § 2 (1943). It is not clear that this limitation on reformation was understood in *Otoe and Missouria Indians* v. *United States*, 131 Ct. Cl. 593, 599 (1955) and *Western Cherokee Indians* v. *United States*, 114 Ct. Cl. 716, 720 (1949) (e.g., reformation does not lie for unconscionable consideration, which always goes to the inducement, not to the reduction to writing). Prior to the Indian Claims Commission Act, of course, this Court had no power to reform a treaty. *Western Cherokee*, above, 114 Ct. Cl. at 720-721.

[17] *Klamath Indians* v. *United States*, 2 Ind.Cl.Comm. 284, 287 (1954).

only on exactly $1 million does not end the inquiry. Under the Act, the Commission had a duty to consider whether that agreement to pay interest should be revised on the basis of what the parties intending to make a fair deal *would have* intended had they agreed to a consideration of $3,022,575 instead of $1,626,222. That is what the Commission did, but the Court of Claims reversed, indicating that the revision power does not apply to interest clauses. The court cited no legislative history in support of this conclusion, nor could it have.

Granted, the Commission, and those who review the Commission, should approach its task with an awareness of the general policy against interest against the sovereign, and of the large amounts at stake in Indian claims. If the United States had not agreed to pay any interest at all, the Indians no doubt would have no case. The Commission would be understandably reluctant to write a brand new interest clause into the agreement, and has never done so. But since the United States *did* agree to interest here, did agree in principle, in other words, then the case for revision is surely within the *Peoria* rationale and the intent of the Act.

CONCLUSION

When an Agreement expressly provides for interest on the stated consideration, and the Agreement has been revised to increase the consideration, as here, it is artificial, and certainly not in harmony with the purposes of the Indian Claims Commission Act and the spirit of *Peoria*, to say that the Commission is not permitted to revise the interest clause as well. Certiorari should be granted, and the judgment of the Court of Claims reversed.

Respectfully submitted,

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June 17, 1971